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Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984.

ROBIN DOOLEY and PATRICK MATZ,

Petitioners,

vs.

JEROME REISS, KEN MC ALPINE, MIKE MANLEY, RANDY WORRELL, DALE WILCOX, and STEPHEN MARKS,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent STEVEN MARKS respectfully prays that a writ of certiorari not be issued to review the judgment and opinion of the United States

Court of Appeals for the Ninth Circuit entered in this proceeding on July 10, 1984.

1. STATEMENT OF THE CASE

On August 19, 1983, the Plaintiffs-Petitioners (hereinafter collectively referred to as "Petitioners") initiated a civil rights action in the United States District Court for the Central District of California, seeking recovery under 42 U.S.C. §§ 1983, 1985(2). and 1986 (hereinafter the "Dooley action.") This action arose out of an earlier civil rights action against police officers for an alleged unlawful search of Petitioners' home (hereinafter the "Dellos action"). After two trials the Dellos action was resolved through settlement.

In the Dooley action, Petitioners allege that Respondent Marks,

the attorney for the police officers in the Dellos action, conspired to deprive Petitioners of the testimony of four potential witnesses. In the Dellos action, Petitioners propounded an interrogatory to the police officers which asked if any police reports had been prepared in connection with the challenged search. The police officers initially failed to disclose the existence of a police report in their answer. Petitioners claim that by the time they discovered the existence of the police report they were unable to locate four individuals named on the document, and were thereby denied an opportunity to call these potential witnesses.

In response to the Petitioners' Complaint in the Dooley action, Respondent Marks filed a Motion to Dismiss pursuant to Rule 12(b)(1) and (6) of the Fed. R.

Civ. P. On October 13, 1983, the Honorable David V. Kenyon, United States District Court Judge Presiding, granted Respondent Marks' Motion to Dismiss with prejudice. On July 10, 1984, the Court of Appeals for the Ninth Circuit affirmed the District Court's order in part and reversed in part. On September 10, 1984, the District Court spread the order upon the record. The subject Petition for Certiorari followed shortly thereafter.

2. REASONS WHY THE WRIT SHOULD NOT BE GRANTED

A. The Court Of Appeals Correctly Found No Deprivation Of Petitioners' Federal Rights

This Court has held, and the Circuit Courts are in uniform agreement, that in order to state a claim under 42 U.S.C. § 1983, the plaintiff must allege

that he has been deprived of a federal right. (Parratt v. Taylor, 451 U.S. 527, 535 (1981), Gomez v. Toledo, 446 U.S. 635, 640 (1980)).

In affirming the dismissal of Petitioners' section 1983 claims the Court of Appeals correctly found that Petitioners had failed to satisfy this requirement. Petitioners could not and cannot point to which constitutional or federal right they have been deprived of. The withholding of evidence, its concealment, and perjury of defendant witnesses with respect to a federal judicial proceeding does not reflect the violation of any federal or constitutional right.

Even accepting petitioners claims of conspiracy, no section 1983 claim can be maintained without an actual deprivation of rights. Villanueva v. McInnis, 723 F.2d 414, 418 (5th Cir.

1984), Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980), Hampton v. Hanrahan, 600 F.2d 600, 622, (7th Cir. 1979). Accordingly, Petitioners can maintain no section 1983 claim.

B. The Inability To Call Witnesses At Trial Does Not Constitute An Improper Influence On The Verdict Of A Jury Within The Meaning Of Section 1985(2)

Petitioners' claim that by willfully concealing evidence, Respondents conspired to improperly influence the verdict of a jury in federal court thereby violating 42 U.S.C. § 1985(2). The Court of Appeals dismissed this claim finding no influence on the jury. Petitioners contend that the Court of Appeals erroneously required a conspiracy to influence the jury verdict by "force, intimidation, or threat."

To understand why Petitioners' contention is fundamentally flawed, it is necessary to first review the history of section 1985. It was originally adopted as Section 2 of the Civil Rights Act of 1871. Section 2 of the 1871 Act contained one long paragraph proscribing numerous classes of conspiratorial activity. When Congress enacted the Revised Statutes in 1874, this paragraph was codified as Section 1985 and divided into three subsections.

As part of this reclassification, the phrase "force, intimidation or threat" was deleted from the clause dealing with the improper influence of juries but retained in the body of Section 1985(2). In Kush v. Rutledge, ____ U.S. ____, 103 S.Ct. 1483, 1487 (1983), this court noted that the "reclassification was not intended to

change the substantive meaning of the 1871 Act." Relying on Kush v. Rutledge, the Court of Appeals rejected Petitioners' argument that this deletion resulted in substantive changes to Section 1985.

In any event, the Court of Appeals did not hold that an allegation of "force, threat or intimidation" was a necessary requirement of a Section 1985(2) claim. Rather, the Court of Appeals simply determined that the facts alleged could not equate with 'influencing' the jury. This is the same result achieved by the Court of Appeals in Brawer v. Horwitz, 535 F.2d 830 (3rd Cir. 1976):

> "[W]e believe it wholly logical and reasonable that, in compiling the Revised Statutes, Secretary Fish's commission deleted the words ("force, intimidation, or

threat"), recognizing that juries can be 'influenced' as often and perhaps more effectively by positive inducments--such as money--as they can be negative inducements, including force, intimidation or threats. In our view, the deletion was not substantive, . . . but sought to clarify the congressional intent to reach all conspiracies to influence jurors directly."

Id. at p. 840.

The inability of a party to present evidence to a jury is not the type of influence encompassed by Section 1985(2). Accordingly, the Court of Appeals correctly affirmed the dismissal of Petitioners' section 1985(2) claim.

C. Petitioners Had The Right To Seek Redress For The Alleged Wrongdoing In The Dellos Action

Without stating so directly, Petitioners intimate in their opening brief that unless this Petition is granted they will be deprived of a remedy for the alleged wrongdoing of the Respondents. While it cannot be argued that litigants should not fabricate evidence or suppress incriminating documents, such wrongs are not within the ambit of the Civil Rights Acts and are adequately dealt with in present court rules and criminal prosecutions for perjury. (See, Rule 37(b)(2) of the Fed. R. Civ. P.; and Hampton v. Hanrahan, 600 F.2d 600, 641-642 (7th Cir. 1979).) The Civil Rights Acts were never intended to provide a remedy for

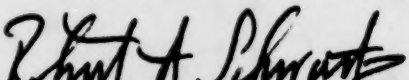
discovery abuses in the civil litigation process.

3. CONCLUSION

For these reasons, Respondent Marks respectfully requests that a writ of certiorari not be issued to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

ROBERT A. SCHWARTZ
LEWIS, D'AMATO, BRISBOIS & BISGAARD

By 
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